IN THE

# Supreme Court of the United States

October Term, 1975

No. 75-1373

John Exaba Irving, Petitioner

v

United States of America, Respondent.

## PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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## ENTRY OF APPEARANCE

The Clerk will enter my appearance as counsel for the Petitioner.

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I hereby certify that although at the time of the preparation of this Entry of Appearance, I am not an individual member of the bar of the Supreme Court of the United States, I have heretofore forwarded to the Clerk of the Supreme Court of the United States an application for admission to the bar of the Supreme Court of the United States, together with all necessary supporting documents.

The Clerk is requested to notify counsel of the action of the Court by means of collect telegram.

Andrew J. Focht

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

John Exaba Irving, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on January 19, 1976.

## OPINIONS BELOW

The January 19, 1976, opinion of the United States Court of Appeals for the Tenth Circuit is unreported and is printed in Appendix A hereto, infra page 18. The Judgment and Commitment Order of the United States District Court for the District of Kansas is printed in Appendix A hereto, infra, page 24.

## JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on January 19, 1976. A timely petition for rehearing was filed (Appendix A, infra, page 26) and was denied on February 25, 1976, (Appendix A, infra, page 37). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

The questions raised in this case are:

1. Whether the concurrent sentence doctrine is no longer a valid rule of judicial expediency because of the adverse collateral consequences that result from a conviction in addition to imprisonment; and

2. If the concurrent sentence doctrine is valid, is it applicable in the present situation since the conviction on the substantive count, which was presumed to be valid in order to impose the doctrine, is itself dependent for its soundness upon the validity of the unreviewed conspiracy count?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

28 U.S.C. §1291

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Rule 3(a) of Federal Rules of Appellate Procedure, in part:

"An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4 . . . "

Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."



## STATEMENT OF THE CASE

### Nature of the Case

Petitioner was indicted in an eleven (11) count indictment on June 20, 1974. Petitioner was charged with only two counts of the eleven. In Count One (1) he was charged with Larry Ray Thompson, Patricia Ann Ponds, Peter Calvin Jones, Anthony D. Minnis and Elizabeth Ann Smallwood to have conspired to commit offenses defined in Subchapter I of Chapter 13, Title 21, United States Code, in that it was the object and purpose of the conspiration to possess with intent to distribute, and to distribute controlled substances and narcotic drugs, namely heroin and cocaine, in violation of 21 U.S.C. 846. Twenty-four overt acts were alleged beginning November 13, 1973, and ending May 30, 1974. Petitioner was alleged to have committed two overt acts on January 29, 1974, which consisted of possessing two plastic bags which the prosecution claimed to contain heroin and selling and delivering the same to Park M. Kaestner. All other overt acts pertained to other alleged co-conspirators.

In Count Eight (8) petitioner and Patricia Ponds were charged with distribution of heroin on January 29, 1974, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

### Course of Proceedings and Disposition in the Lower Courts

Petitioner was originally indicted on June 20, 1974, by the grand jury. He was afforded and participated in an omnibus hearing on July 12, 1974. At such hearing the petitioner moved to sever his case, for a separate trial and to sever Count Eight (8) of the indictment and for a separate trial thereon, all of which was denied. Petitioner was reindicted by the grand jury on November 13, 1974.

Petitioner was arraigned on the original indictment on July 25, 1974, and arraigned on the subsequent indictment on December 9, 1974, with trial commencing the same day. Peter Jones and Elizabeth Smallwood both had failed to appear and had warrants issued for them at the time of this trial and thus were not present. Larry Thompson pled guilty to one count on the morning of the trial. A motion for directed

verdict of acquittal and that the charge be dismissed as to Count One (1) of the indictment and for a mistrial and severance as to Count 8 pertaining to petitioner was made at the end of the Government's evidence on December 11, 1974, and renewed at the end of all of the evidence on December 12, 1974, all of which was denied. Additionally, petitioner moved at the end of all the evidence on December 12, 1974, to strike all testimony pertaining to Larry Thompson, Elizabeth Smallwood and Peter Jones, which was denied. Motions for judgment of acquittal or in the alternative for a new trial were denied by the Court on January 13, 1975, following the petitioner having been found guilty by a jury on December 13, 1974.

On January 13, 1975, petitioner was sentenced to the custody of the Attorney General for a period of five (5) years on Count I; and for a term of five (5) years on Count VIII concurrently; to become eligible for parole at such time as the United States Board of Parole may determine, pursuant to 18 U.S.C. 4208(a)(2). Notice of appeal from the final judgment, order, sentence and all orders made during trial and all the findings entered therein prior to and including January 13, 1975, was filed on January 22, 1975. The petitioner filed a timely appeal with the United States Court of Appeals for the Tenth Circuit wherein the judgment of the United States District Court for the District of Kansas was affirmed on January 19, 1976. A petition for rehearing was filed in the Tenth Circuit and denied on February 25, 1976.

**The Evidence**

At trial, the Government's case in chief consisted of two witnesses. The first was a Kansas City, Missouri police officer assigned to the Drug Enforcement Administration Task Force of the Federal Government. His name was Park M. Kaestner and his undercover name was Johnnie Copa. He testified over objection as to drug purchases made from Larry Thompson on November 19, 1973, in Kansas City, Kansas. He testified over objection to conversations with a Pat Norris that she knew where he could get heroin. Petitioner took the position that the testimony was inadmissible as hearsay and not relevant since there was no conspiracy established. The Court informed the jury that they would disregard the evidence if no conspiracy were established.



Kaestner testified as to several drug purchases which involved only Larry Thompson who was not a defendant in this trial. These drug purchases included: heroin on November 19, 1973, which was the basis of Count II against Larry Thompson; cocaine on November 21, 1973, which was the basis for Count III against Thompson; heroin on November 21, 1973, which was the basis of Count IV against Larry Thompson; heroin on December 4, 1973, which was the basis of Count V against Thompson.

Kaestner then testified he was introduced by Thompson to Patricia Ponds on December 5, 1973, and testified as to a heroin purchase from Miss Ponds on that date, which was the basis of Count VI against Thompson and Ponds.

Kaestner then testified as to telephone calls between himself and Larry Thompson on November 20, 1973, and December 5, 1973, concerning drug purchases. Exhibit 11 was a tape recording of such conversations and was offered into evidence over objection by counsel. Petitioner's objection was that the conversations and tape recordings thereof were not relevant or material to the petitioner.

Kaestner then testified as to telephone calls between himself and Patricia Ponds on December 11, 1973, concerning drug purchases. Exhibit 13 was a tape recording of such conversations and was offered into evidence over objection by counsel on the same grounds as upon exhibit 11.

Kaestner testified he saw petitioner on one occasion on January 20, 1974, when Ponds called petitioner to come to a motel in Wichita after Kaestner had complained about the quality of the heroin she had sold him in the past and questioned the quality of the heroin she had on that date. Petitioner was said to have brought two other bags of heroin to the motel and sold one to Kaestner.

That was the first, last and only time there was evidence of any drug distribution by petitioner. Kaestner said he never

saw petitioner again until he was arrested and never tried to contact him again.

Kaestner testified he contacted Ponds on March 19, 1974, about some drug purchases and on March 20, 1974, she brought Anthony Minnis and Peter Jones to him for the sale of heroin. Ponds, Minnis and Jones were charged in Count IX with distributing heroin to Kaestner as a result of this incident.

Kaestner testified that on March 20, 1974, he received a quantity of heroin from Elizabeth Smallwood. She was at the location where Kaestner was directed by Jones to go to pick up a purchase of heroin. Elizabeth Smallwood was charged in Count X with distributing heroin as a result of this transaction.

Kaestner then testified that on May 2, 1974, he received a quantity of heroin from Peter Jones. From this transaction, Jones was charged in Count XI with distributing heroin.

The Court admitted into evidence Government exhibits 11, 12, 13, 14 and 15. Exhibit 11 was the tape recording of conversations between Kaestner and Larry Thompson. Exhibit 13 was the tape recording of conversations between Kaestner and Patricia Ponds. Both exhibits had been previously objected to and were under a continuing objection. Exhibits 12, 14 and 15 were pictures of Larry Thompson, Peter Jones and Elizabeth Smallwood respectively.

On cross-examination, Kaestner said he had no knowledge that petitioner knew Thompson, Jones, Smallwood or Minnis or had any connection with them. The only other evidence in trial on this question was by Thompson, Minnis and petitioner, all said that they did not know one another. Petitioner further testified that he did not know Jones or Smallwood.

The only other witness for the Government in its case in chief was Terry A. DalCason, a chemist, who testified as to chemical tests done to determine the quantity and quality of the submitted exhibits.

Exhibits 1 through 10 including 1, 1A, 2, 2A, 3, 3A, 4, 4A, 5, 5A, 6, 6A, 7, 7A, 8, 8A, 9, 9A, 10 and 10A, were admitted into



evidence over objection of petitioner's counsel. Exhibits 1 and 1A were the heroin alleged to have been purchased from Thompson on November 19, 1973. Exhibits 2 and 2A were the cocaine alleged to have been purchased from Thompson on November 21, 1973. Exhibits 3 and 3A were the heroin alleged to have been received from Thompson on November 21, 1973. Exhibits 4 and 4A were the heroin alleged to have been obtained from Thompson on December 4, 1973. Exhibits 5 and 5A were the heroin alleged to have been obtained from the transaction with Thompson and Ponds. Exhibits 6 and 6A were the heroin alleged to have been purchased from Ponds on December 11, 1973. Exhibits 7 and 7A were the heroin alleged to have been purchased from the petitioner on January 29, 1974. Exhibits 8 and 8A were the heroin alleged to have been received from Jones on March 20, 1974. Exhibits 9 and 9A were heroin alleged to have been purchased from Elizabeth Smallwood on March 20, 1974. Exhibits 10 and 10A were the heroin alleged to have been received from Jones on May 2, 1974.

Petitioner's counsel objected to the admission into evidence of exhibits 1 through 10 except for exhibits 7 and 7A on the grounds that only the latter applied to the petitioner and, therefore, the remainder of the exhibits were not relevant. This objection was overruled and the exhibits were admitted into evidence.

At the end of the evidence for the Government, this petitioner moved for a directed verdict of acquittal and that the case be dismissed on Count I, and that a mistrial be declared and his trial on Count VIII be severed. All of these motions were renewed at the end of all the evidence and denied.

Larry Thompson was called as a witness for Patricia Ponds and on cross-examination said he didn't know the petitioner.

Patricia Ponds, testifying in her own behalf, admitted most of the drug transactions but contended she was led into them by the activities between herself and Kaestner. She did testify that petitioner had nothing to do with any drug trans-

actions. On cross-examination her income tax return was admitted into evidence as exhibit 16.

One of the Government's witnesses in rebuttal was Pat Norris, who was an informer. She testified as to activities with Thompson and Ponds and admitted she didn't even know petitioner.

The petitioner objected to the Court instructing the jury on Count I concerning conspiracy but was overruled.

The jury convicted all defendants on all counts. A renewed motion for judgment of acquittal or in the alternative for a new trial was filed, argued and denied and the petitioner was sentenced.

**The Rulings Below**

Throughout the trial, the petitioner requested severance and objected to evidence which was relevant only to other defendants, both of which were overruled. The bulk of the evidence concerned defendants who were not even present for trial. The indictment charged only one conspiracy, the trial court instructed on only one conspiracy and the jury convicted all defendants as to that one conspiracy. Throughout the trial, the Court had instructed the jury that if they found a conspiracy, then the acts or the statements of any of those found to be conspirators could be used as evidence against all of the defendants found to be members of the conspiracy.

The petitioner perfected a timely appeal to the United States Court of Appeals for the Tenth Circuit. Among the issues raised on appeal was that the Trial Court erred in failing to grant a severance or in the alternative to instruct the jury as to multiple conspiracies. The petitioner pointed out that this error affected both the conspiracy count and the substantive count because of the "spillover effect" of the instruction which the Trial Court gave allowing the acts or statements of one conspirator to be used against all found to be co-conspirators.

The United States Court of Appeals for the Tenth Circuit refused to examine any issues raised concerning the conspiracy



conviction because the Court upheld the conviction on the substantive count and invoked the concurrent sentence doctrine. The petitioner subsequently submitted a timely petition for rehearing which was denied.

**REASONS FOR GRANTING THE WRIT**

**I. Certiorari Should Be Granted To Resolve Conflicts In Principle Among The Courts Of Appeals.**

The decision of the Court of Appeals in refusing to examine the validity of the petitioner's conviction on the conspiracy count was based on the concurrent sentence doctrine. The application of this doctrine in the Tenth Circuit is in conflict with the recent decisions of the Seventh and Eighth Circuits which have refused to follow the rule and seriously question its efficacy. The basis for the confusion among the various circuit courts stems from the effect of the United States Supreme Court decision of *Benton v. Maryland*, 395 U. S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969) which criticized the application of the concurrent sentence doctrine.

It appears that the doctrine began when applied to the situation of a single general sentence and was carried over to concurrent sentences in the case of *Hirabayashi v. United States*, 320 U. S. 81, 87 L. Ed. 1774, 63 S. Ct. 1375 (1943). In reviewing prior decisions the *Benton* Court held:

> "One can search through these cases, and related ones, without finding any satisfactory explanation for the concurrent sentence doctrine." 23 L. Ed. 2d at 713.

A pure application of the concurrent sentence doctrine presumes that the conviction on one count, even though erroneous, will not affect the validity of the conviction of another count which would otherwise be valid. The rationale is that the defendant will not be harmed because he will be serving the same sentence for the valid conviction that he is serving for the invalid conviction. Therefore, the defendant's term of imprisonment will not be affected. However, such a concept considers that the only harm rendered by a conviction is the term of imprisonment that the defendant must serve and totally overlooks the collateral consequences of a conviction.

While the *Benton* decision refused to decide the question of whether the concurrent sentence doctrine should be expressly overruled, it seriously questioned its validity by pointing out the adverse collateral effects of the imposition of the doctrine. The *Benton* Court cited the prior decision of *Sibron v. New York*, 392 U. S. 40, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (1968) in stating:

> "*Sibron* and a number of other recent cases have canvassed the possible adverse, collateral effects of criminal convictions, and we need not repeat that analysis here. It is enough to say that there are such possibilities in this case. For example, there are a few States which consider all prior felony convictions for the purpose of enhancing sentence under habitual criminal statutes, even if the convictions actually constituted only separate counts in a single indictment tried on the same day. Petitioner might some day in one of these States have both his larceny and burglary convictions counted against him . . . Moreover, as in *Sibron*, both of petitioner's convictions might some day be used to impeach his character if put in issue at a future trial. Although petitioner could explain that both convictions arose out of the same transaction, a jury might not be able to appreciate this subtlety." 23 L. Ed. 2d at 714.

The question raised by the *Benton* decision as to the harmful effects of the concurrent sentence doctrine remains unanswered. As noted in *The Federal Concurrent Sentence Doctrine*, 70 Columbia Law Review 1099, the *Benton* opinion left the circuit courts in a state of confusion. Some circuits have continued to question the validity of the doctrine in light of the harmful collateral effects, in refusing to apply it. Other circuits cite the rule as being purely discretionary and apply it as a matter of judicial expediency.

Although the United States Supreme Court has not specifically addressed the question of the validity of the doctrine subsequent to *Benton*, it has again indicated on this point that judicial expediency should not be obtained at the expense of justice in *United States v. Maze*, 414 U. S. 395, 38 L. Ed. 2d 603, 94 S. Ct. 645 (1974). The Supreme Court cited with approval the statement of the Sixth Circuit in the same case



when it refused to apply the concurrent sentence doctrine, holding:

> "No considerations of judicial economy or efficiency have been urged to us that would outweigh the interest of appellant in the opportunity to clear his record of a conviction of a federal felony. 468 F. 2d 529, 536 n.6" 38 L. Ed. 2d at 607, n.1.

One of the leading circuit court decisions subsequent to *Benton* which continues to question the validity of the doctrine is *United States v. Tanner*, 471 F. 2d 128 (7th Cir. 1972) where the Court held:

> "Until recently, the validity of Count VII would have rendered unnecessary further inquiry into the validity of Count IV where Tanner is concerned, and Counts I and IV where Pearl is concerned. Appellate review would here be avoided since Tanner and Pearl's sentences under Count VII are concurrent with the sentences assessed under all other counts of the indictment. [Citations omitted]. But the Supreme Court's decision in *Benton v. Maryland*, [citation omitted] constitutes a reevaluation of the 'concurrent sentencing doctrine.' *Benton* holds that there is no jurisdictional bar (stemming from the requirement of justiciability) to a consideration of all counts under concurrent sentences. The Court points out that an unreviewed count could increase an appellant's future sentencing under a habitual offender statute, or adversely affect his chances for parole, or be used to impeach his testimony at a future trial. *Benton* suggests that review is desirable where adverse collateral consequences of this nature may flow from conviction. [Citations omitted]. Since we cannot say that there is no possibility of undesirable collateral consequences attendant upon these convictions, we choose to consider the validity of all the challenged counts." 471 F. 2d at 140.

A recent case in the same circuit citing the *Tanner* decision is *Crovedi v. United States*, 517 F. 2d 541 (7th Cir. 1975) holding:

> "At one time the two sentences to be served would have eliminated the necessity of vacating either by virtue of their being concurrent. In this Circuit, at least because

of the possibility of undesirable collateral consequences attendant upon more than one conviction, the so called concurrent sentence doctrine would not be applicable." 517 F. 2d at 550.

Similarly citing the *Tanner* decision with approval in refusing to apply the doctrine is *Wright v. United States*, 519 F. 2d 13 (7th Cir. 1975).

Outside the Seventh Circuit, the *Tanner* decision has also received approval in *United States v. Belt*, 516 F. 2d 873 (8th Cir. 1975) where the defendant was convicted of robbery, larceny and burglary and the Court refused to apply the doctrine stating:

> "We seriously question the efficacy of the concurrent sentence rule where the crimes charged in the various counts are serious and differing in substance. In such instance, the possibility of collateral effects from a possibly erroneous conviction appear very real." 516 F. 2d at 876.

The Supreme Court of the United States in *Benton* and subsequently in *Maze* has sharply criticized the use of the concurrent sentence doctrine. Some circuit courts including the Tenth Circuit have continued to apply the doctrine, while other circuit courts, such as the Seventh Circuit and Eighth Circuit, have refused to do so. Therefore, certiorari should be granted in this case to resolve the conflicts in principle among the Courts of Appeal.

## II. The Validity of the Concurrent Sentence Doctrine Is An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The concurrent sentence doctrine is a rule of judicial expediency and its application in a situation where there is any possibility of adverse consequences is a violation of the due process clause of the United States Constitution.

It is a general principle of law that the due process requirements do not contemplate that criminal defendants have a right to appellate review of their conviction. *McKane v. Durston*, 153 U. S. 684, 38 L. Ed. 867, 14 S. Ct. 913 (1894); *Ross v. Moffitt*, 417 U. S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974). However, it has likewise been held that where appellate review of criminal convictions is made available, the appellate procedure becomes subject to the due process requirements. *Frank v. Mangum*, 237 U. S. 309, 59 L. Ed. 969, 35 S. Ct. 582 (1914); *Cole v. Arkansas*, 333 U. S. 196, 92 L. Ed. 644, 68 S. Ct. 514 (1947). 28 U.S.C. §1291 and Rule 3(a) of the Federal Rules of Appellate Procedure combine to guarantee a defendant in a federal criminal trial the right to seek appellate review of his conviction. Therefore, due process requirements should apply to the appellate procedure.



The cases questioning the validity of the concurrent sentence doctrine have never analyzed it in terms of whether it complies with the constitutional requirements of due process. The earlier quoted section from *United States v. Maze* hints at the concept of due process. There the Supreme Court approved the statement of the Sixth Circuit that judicial economy does not outweigh the interest of a criminal defendant to clear his record of a conviction.

In *Benton* the Supreme Court refused to decide whether the concurrent sentence doctrine retains any validity although the Court did sharply criticize the doctrine. However, the Court did suggest that there may be some constitutional questions concerning its validity, although they were not specifically brought out as an issue in *Benton* when it stated:

> "In *Sibron* we noted the inadequacies of a procedure which postpones appellate review until it is proposed to subject the convicted person to collateral consequences. 392 U. S. at 56-57, 20 L. Ed. 2d at 930, 931. For the reasons there stated, an attempt to impose collateral consequences after an initial refusal to review a conviction on direct appeal because of the concurrent sentence doctrine may well raise some constitutional problems. That issue is not, however, presented by this case, and accordingly we express no opinion on it." 23 L. Ed. 2d at 714, n. 7.

The validity of the concurrent sentence doctrine may well rest in the concept of due process. While due process has never been specifically defined, it has been expressed to

mean that the constitutional requirements are met if it does not offend the traditional notions of fair play and substantial justice. The refusal to grant a defendant the access of the court system to challenge an erroneous conviction because the length of his imprisonment will not be affected must of necessity be a denial of his constitutional guarantee of due process. To label a defendant's wrongful conviction as irrelevant or outweighed by judicial expediency violates all concepts of justice. The validity of the concurrent sentence doctrine is an important question of federal law, and therefore certiorari should be granted so that this Court may resolve the dispute.

**III. The Application Of The Concurrent Sentence Doctrine In The Present Case Is In Conflict With A Decision Of This Court.**

The justification for the concurrent sentence doctrine in the past is that it is a method of judicial economy whereby a conviction will not be reviewed if the defendant's length of imprisonment will not be affected. However, the rule itself recognizes that this would not be applicable where the length of imprisonment could be affected. Therefore, the application of the concurrent sentence doctrine in the present case is in conflict with the United States Supreme Court decision in *Kotteakos v. United States,* 328 U. S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239 (1945). The issues raised on appeal as to the conspiracy count in the present case likewise affect the validity of the substantive count because of the application of *Kotteakos.*

The failure of the trial Court to grant a severance or alternatively instruct the jury as to multiple conspiracies rather than a single conspiracy requires the reversal of the substantive count as well as the conspiracy count. This has sometimes been referred to as the spillover effect. The petitioner's brief on appeal to the Tenth Circuit pointed out that the same error requiring reversal of the conspiracy count taints the substantive count because of the trial Court's repeated instructions that acts or statements of any of the conspirators may be used against the co-conspirators. This



rule is clearly established in *Kotteakos* which has been cited extensively and never been reversed by subsequent Supreme Court decisions. In reversing the conspiracy count on the grounds that a single conspiracy was charged and instructed to the jury while multiple conspiracies were indicated by the evidence, the *Kotteakos* Court also required the substantive counts to be reversed stating:

> "Moreover, the effect of the Court's misconception extended also to the proof of overt acts. Carrying forward his premise that the jury could find one conspiracy on the evidence, the trial judge further charged that, if the jury found a conspiracy, 'then the acts or the statements of *any* of those whom you so find to be conspirators between the two dates that I have mentioned, may be considered by you in evidence as against *all* of the defendants whom you so find to be members of *the* conspiracy.' (Emphasis added)
>
> "On those instructions it was competent not only for the jury to find that all of the defendants were parties to a single common plan, design and scheme, where none was shown by the proof, but also for them to impute to each defendant the "acts and statements of the others without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could only have affected some." 90 L. Ed. at 1567-1570.

The substance of this argument applied to this case is that the petitioner could have been convicted from evidence applicable only to a co-defendant who was, according to the evidence, a member of a different conspiracy, but such evidence was transferred to the petitioner by a combination of the single conspiracy instruction and the co-conspirator instruction. Therefore, those arguments applicable to the conspiracy count in the present case would have also been applicable to the substantive count with the result being that either both of the convictions were valid or both were invalid.

The Tenth Circuit presumed that the substantive count was valid in order to base its application of the concurrent sentence doctrine and deny review of the arguments appli-

cable to the conspiracy. In doing so, the Court made a false presumption since those arguments which may invalidate the conspiracy count would likewise invalidate the substantive count. Accordingly, the Tenth Circuit either misapplied the concurrent sentence doctrine or made its decision in conflict with the *Kotteakos* decision of this Court.

**IV. The Legal Issue That Was Not Examined By The United States Court of Appeals For The Tenth Circuit Because Of The Application Of The Concurrent Sentence Doctrine Is A Source Of Conflict Among The Circuit Courts Which Has Not Been Resolved By This Court.**

The charge of a single conspiracy in the indictment and instructions to the jury in terms of a single conspiracy where only multiple conspiracies are shown by the evidence constitutes reversible error according to the United States Supreme Court decision in *Kotteakos*, as mentioned above. This is a well accepted rule of law, but the circuit courts are in conflict as to what constitutes that of a single conspiracy or that of a multiple conspiracy. The Supreme Court of the United States has not but should settle this conflict among the circuit courts.

Most of the circuit courts, including the Tenth Circuit, require as necessary elements for a conspiracy to exist an agreement whereby at some point in time there must be a meeting of the minds in the common design, purpose, or objects of the conspiracy. *United States v. Butler*, 494 F. 2d 1246 (10th Cir. 1974); *United States v. Crocker*, 510 F. 2d 1129 (10th Cir. 1975). However, the Second Circuit in the area of narcotics conspiracies has adopted a rule that presumes a narcotics dealer to be in a conspiracy with all buyers or sellers, above or below him in the chain of distribution. This is in conflict with the general rule concerning conspiracies which requires some actual meeting of the minds.

In the present case the record was absolutely devoid as to an actual meeting of the minds among all of the defendants. In addition, the evidence should rule out any presumed conspiracy since some of the defendants were in different



lines or "chains" of distribution. Therefore, the petitioner presented an issue of greatest importance on appeal, but the Tenth Circuit refused to review it on the grounds that the concurrent sentence doctrine precluded review. Certiorari should be granted to examine the legality of the Tenth Circuit's justification for refusing to review an issue of such importance.

## CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Andrew J. Focht
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*Counsel for Petitioner*

March 23, 1976

# APPENDIX A

**NOT FOR ROUTINE PUBLICATION**

**(Filed January 19, 1976)**

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 75-1169

UNITED STATES OF AMERICA,
*Appellee,*
v.
JOHN EXABA IRVING,
*Appellant.*

Appeal From The United States District Court For The District of Kansas (D.C. # 74-156-CR6)

Jack Focht, Wichita, Kansas (Clark V. Owens II, Smith, Shay, Farmer & Wetta, Wichita, Kansas, with him on the Brief), for Appellant.

Stephen K. Lester, Assistant United States Attorney (E. Edward Johnson, United States Attorney, with him on the Brief), for Appellee.

Before LEWIS, Chief Judge, SETH and McWILLIAMS, Circuit Judges.

SETH, Circuit Judge.



Defendant-appellant Irving was convicted by a jury of conspiracy to distribute cocaine and heroin and also of the substantive offense of distributing heroin, all in violation of 21 U.S.C. §§ 846 and 841(a)(1). He was sentenced to two concurrent terms of five years.

Appellant was indicted with five others, two of whom jumped bond and were not present at trial; one pled guilty to one count. The other two stood trial with appellant on five counts of the eleven count indictment.

Appellant argues thirteen points for reversal. Three concern the Government's case against him for the substantive count of distribution, while the other ten involve his conviction on the conspiracy count.

The general rule when dealing with a conviction on multiple counts is that where a defendant is sentenced on each count with all the sentences running concurrently, reversal of judgment on one count does not affect the judgment and sentence on any of the other counts. *Schultz v. United States*, 432 F. 2d 25 (10th Cir.); *Romontio v. United States*, 400 F. 2d 618 (10th Cir.). Thus where the appellate court under such circumstances affirms on one count, it may decline to decide the issues raised as to another count since reversal of that count would not alter a sentence of concurrent terms and no practical adverse consequences could result. *United States v. Bath*, 504 F. 2d 456 (10th Cir.); *United States v. Sawyer*, 485 F. 2d 195 (10th Cir.). Thus if the conviction for distribution survives appellate review, the court need not decide the merits of the conspiracy conviction.

We turn first, then, to the substantive count of distribution of heroin. Appellant's conviction on this count is primarily based on the testimony of a federal narcotics agent who was present at the time of the alleged distribution. The only other evidence put on by the Government was a laboratory report on a heroin sample sent in by the same agent. The agent testified he received this heroin from appellant. As a defense appellant offered an alternative story which contradicted the agent's version as to appellant's involvement in the drug sale.

Over objection as to relevance, the agent in his testimony described the relationship between the quality and quantity of heroin purchased in his experience. That is, that in larger quantity purchases the quality was higher. He testified without objection that the drugs received from appellant were of high quality. In this his only attack on the agent's testimony, appellant now argues that this testimony, as used by the prosecution in its closing summation to speculate as to appellant's status as a major source of drugs for the conspiracy ring, was immaterial to the substantive count and as used by the prosecution was extremely prejudicial. The Government urges this particular testimony to be admissible as material to the conspiracy charge rather than the one for distribution. The trial court ruled at the time this testimony was being given that it was not prejudicial and recognized its materiality by allowing its admission into evidence. It is clear that trial courts are to be granted wide discretion in determining the admissibility of evidence. In the absence of a showing of an abuse of that discretion, the appellate court should not overturn the ruling by the trial court. We find no such abuse of discretion.

The second ground for reversal of the distribution conviction asserted by appellant is the failure of the trial court to require the Government to reveal the extent of plea bargaining between Larry Thompson, a codefendant, and the Government. The record shows that defense counsel was informed of the final agreement and Thompson was available for cross-examination as to that agreement. Thompson was not called by the Government but by a codefendant. Defense counsel had opportunity to uncover the factors involved in reaching the agreement, but the record shows that counsel chose not to question Thompson about his plea or any agreement made in connection with it. In addition, appellant fails to allege any prejudicial error, or make any indication as to the advantage he would have gained by such a disclosure. These omissions are quite understandable, since Thompson's only testimony regarding appellant was that he had never met appellant prior to arrest in this case. Appellant has not asserted prejudicial error as to this point because it cannot exist.



Appellant's final assertion of error as to his conviction for distribution is based on certain procedural mistakes by the prosecution which denied him due process and a fair trial. At his omnibus hearing, the Government stated there was no recorded testimony before the grand jury. It then refreshed and impeached its own witness with a transcript of such testimony. In fact, only the testimony of this one witness, Paul Greenberg, was recorded. That testimony contradicted appellant's statements as to a collateral matter, and was used by the prosecution to attack his credibility. Case law generally recognizes suppression by the prosecution at trial of evidence favorable to the defendant to be violative of due process where it is material, even if it only goes to credibility. *Loraine v. United States*, 396 F. 2d 335 (9th Cir.). Two factors present in this case, however, relieve the Government from complying with this rule. Greenberg was a Government witness whose testimony was given before a grand jury. The secrecy of grand jury proceedings has been continually protected by judicial rulings and congressional acts. Congress specifically amended the Jencks Act in 1970 to limit disclosure of grand jury testimony by a Government witness until after that witness has testified at trial. 18 U.S.C. §§ 3500(a) and (e)(3). Under this provision, it is clear that there is no right to pretrial discovery of statements made by Government witnesses to a grand jury. *United States v. Quintana*, 457 F. 2d 874 (10th Cir.); *United States v. Tager*, 481 F. 2d 97 (10th Cir.); *United States v. Gant*, 487 F. 2d 30 (10th Cir.). It is clear from the record that the trial court intended to release the transcript of Greenberg's testimony to defense counsel at the time of Greenberg's appearance as a witness, just as the Jencks Act prescribes. Appellant's counsel was informed of his right to request the transcript at that point in the trial, but he did not elect to do so. Although it was not proper for the Government to misrepresent the partial recordation of grand jury proceedings at the omnibus hearing, appellant suffered no denial of his right to discovery of the record at the proper time. An adequate explanation for the Government's failure has been advanced.

A second misrepresentation made by the Government at the omnibus hearing is also cited by appellant as a denial of

his right to a fair trial. He claims the Government denied there was an informer in the case at that hearing, later producing one at trial. Although the Government's position is equivocal as to its statement at the hearing, the omnibus hearing report contained in the record clearly indicates no informer was involved in the case. At trial, the Government did present as a rebuttal witness Patricia Norris, who indicated her status as an informer. The only portion of her testimony relevant to appellant was that she did not know him. The failure of the government to reveal her name or existence to appellant's counsel could hardly therefore be termed as error if she was in fact an informer. Case law also suggests that in such a situation the general rule requiring disclosure of an informer's name upon defendant's request does not apply. This court, while requiring disclosure of the informer's identity where the informer introduced the federal agent to a codefendant and was present when the illegal sale was made, cites with approval a Ninth Circuit case which found no error in the refusal to disclose where the informer neither witnessed the crime nor conducted business with the defendant. *United States v. Martinez*, 487 F. 2d 973 (10th Cir.), citing *United States v. Kelley*, 449 F. 2d 329 (9th Cir.). *See also United States v. Herbert*, 502 F. 2d 890 (10th Cir.); *United States v. Pennick*, 500 F. 2d 184 (10th Cir.).

Appellant's contentions regarding the prosecution's allegedly improper questioning are meritless. There is no abuse of discretion by the trial court alleged or shown here when it allowed such questioning to take place, and without that abuse appellant's rights cannot be considered prejudiced.

The prosecution's closing argument is the final error asserted by appellant to have denied him due process and a fair trial. He accused the prosecution of misconduct by asserting that the United States Attorney interjected his own integrity and that of the Government witness into final summation. A close reading of the trial transcript reveals no mention in that closing argument as to the attorney's reputation, nor does he directly vouch for the federal agent's veracity. He does discuss the interest each witness had in the outcome of the trial, to which the defense made no objection. Since



counsel did not object, this court must find prejudice to such an extent as to constitute plain error here in order to reverse the conviction. *McBride v. United States*, 409 F. 2d 1046 (10th Cir.). Case law cited by appellant as support for his contention suggests no plain error is present. Although a prosecutor's closing argument in which he indicates his belief in the truth of the testimony of federal agents is improper, this court has earlier refused to find this to be prejudice sufficient to justify reversal. *United States v. Fancutt*, 491 F. 2d 312 (10th Cir.). This court did find prejudicial error in an instance where the prosecution's emphatic, personalized vouching for state police far exceeded anything present in the record on appeal. *United States v. Ludwig*, 508 F. 2d 140 (10th Cir.).

Although appellant's counsel has carefully sifted through the record in this case noting every imperfection as a possible basis for reversal of the conviction for distributing, the grounds alleged have not proved sufficient to justify that result. Under the previously cited rule, the court's affirmance of conviction of this count precludes the necessity of review of the count of conspiracy, since reversal of that count would not alter the sentence imposed, nor cause any adverse consequences.

We find no error, and the judgment is **AFFIRMED**.

# United States District Court for Kansas

United States of America vs.
DEFENDANT
JOHN EXABA IRVING,
Docket No. 74-156-CR6

**JUDGMENT AND PROBATION/COMMITMENT ORDER**

Jan. 13, 1975

**COUNSEL**

With counsel A. J. Focht.

**PLEA**

Not guilty.

**FINDING & JUDGMENT**

There being a verdict of guilty.

Defendant has been convicted as charged of the offense(s) of conspiring to possess with intent to distribute, and distributing heroin and cocaine, in violation of 21 U.S.C. 846, 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

**SENTENCE OR PROBATION ORDER**

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on Count I; and for a term of five (5) years on Count VIII, to become eligible for parole at such time as the United States Board of Parole may determine, pursuant to 18 U.S.C. 4208 (a)(2).

Sentences are to run concurrently to each other.



**SPECIAL CONDITIONS OF PROBATION**

IT IS ADJUDGED that the defendant be granted a 10-day stay of sentence to make appeal, and be continued on the same bond. If no appeal is taken, he is to surrender to the United States Marshal at the end of the 10-day period.

**ADDITIONAL CONDITIONS OF PROBATION**

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Filed Jan. 14, 1975
ARTHUR G. JOHNSON, Clerk
By /s/ *Helen Hope*, Deputy

*/s/ Wesley E. Brown*
WESLEY E. BROWN
U.S. District Judge

Entered in the Docket: 1-14-75

Date 1-14-75

# United States Court of Appeals

TENTH CIRCUIT

No. 75-1169

JOHN EXABA IRVING,
*Appellant,*
vs.
UNITED STATES OF AMERICA,
*Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

## PETITION FOR REHEARING

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# United States Court of Appeals

TENTH CIRCUIT

No. 75-1169

JOHN EXABA IRVING,
*Appellant,*
vs.
UNITED STATES OF AMERICA,
*Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

## PETITION FOR REHEARING

To the Honorable the Chief Judge and the Circuit Judges of the United States Court of Appeals, Tenth Circuit:

The appellant presents this petition for a rehearing of the above cause and, in support thereof, respectfully shows:

1. The appeal in the cause was argued before this Court on November 12, 1975.

2. On January 19, 1976, this Court rendered its decision in favor of the appellee and against the appellant, affirming the judgment of the United States District Court for the District of Kansas.

3. The appellant seeks a rehearing upon the following grounds:

**A. This Court mistakenly refused to review appellant's issues on appeal relating to the conspiracy conviction on the**

grounds that the appellant was sentenced to concurrent terms of imprisonment and review would be unnecessary since the substantive count was affirmed. In support of its decision this Court relied upon what has become known as the concurrent sentence doctrine.

It is the appellant's position that this Court misapprehended the current status of this doctrine. Furthermore, presuming for the moment that a wrongful conviction on the conspiracy count will not taint the substantive count in the present case, there are undesirable collateral effects of an erroneous conviction unrelated to the question of imprisonment.

A pure application of the concurrent sentence doctrine presumes that the conviction on one count even though erroneous will not affect the validity of the conviction on another count which would otherwise be valid. The rationale is that the defendant will not be harmed because he will be serving the same sentence for the valid conviction that he is serving for the invalid conviction. Therefore, the defendant's term of imprisonment will not be affected. However, such a concept is used for the purpose of judicial expediency at the expense of the defendant's right to review of a wrongful conviction. The concurrent sentence doctrine considers that the only harm rendered by a conviction is the term of imprisonment that the defendant must serve and totally overlooks the collateral consequences of a conviction.

The concurrent sentence doctrine has come under attack in recent years and its validity is of questionable standing. Even the courts which still follow the rule recognize that it should not be applied when any adverse consequences could result from the wrongful conviction. The primary source of opposition to this doctrine is found in the United States Supreme Court decision of *Benton v. Maryland*, 395 U. S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969). It appears that the doctrine began when applied to the situation of a single general sentence and was carried over to concurrent sentences in the case of *Hirabayashi v. United States*, 320 U.S. 81, 87 L. Ed. 1774, 63 S. Ct. 1375 (1943). In reviewing prior decisions the *Benton* Court held:



> "One can search through these cases, and related ones, without finding any satisfactory explanation for the concurrent sentence doctrine." 23 L. Ed. 2d at 713.

It seems that prior to *Benton*, the courts routinely applied the concurrent sentence doctrine following precedent without questioning its validity or justification for existence. The *Benton* decision makes it clear that the doctrine will not present a jurisdictional bar to the review of a conviction:

> "But whatever the underlying justification for the doctrine, it seems clear to us that it connot be taken to state jurisdictional rule. [Citations omitted] Moreover, whatever may have been the approach in the past, our recent decisions on the question of mootness in criminal cases make it perfectly clear that the existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy. 23 L. Ed. 2d at 713.

While the *Benton* decision refused to decide the question of whether the concurrent sentence doctrine should be expressly overruled, it seriously questioned its validity by pointing out the adverse collateral effects of the imposition of the doctrine. The Court cited the prior decision of *Sibron v. New York*, 392 U. S. 40, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (1968) in stating:

> "*Sibron* and a number of other recent cases have canvassed the possible adverse, collateral effects of criminal convictions, and we need not repeat that analysis here. It is enough to say that there are such possibilities in this case. For example, there are a few States which consider all prior felony convictions for the purpose of enhancing sentence under habitual criminal statutes, even if the convictions actually constituted only separate counts in a single indictment tried on the same day. Petitioner might some day in one of these States have both his larceny and burglary convictions counted against him. . . Moreover, as in *Sibron*, both of petitioner's convictions might some day be used to impeach his character if put in issue at a future trial. Although petitioner could explain that both convictions arose out of the same transaction, a jury might not be able to appreciate this subtlety." 23 L. Ed. 2d at 714.

The question raised by the *Benton* decision as to the harmful effects of the concurrent sentence doctrine remain unanswered. As noted in *The Federal Concurrent Sentence Doctrine,* 70 Columbia Law Review 1099, the *Benton* opinion left the Circuit Courts in a state of confusion. Some circuits have continued to question the validity of the doctrine in light of the harmful collateral effects, in refusing to apply it. Other circuits cite the rule as being purely discretionary and apply it as a matter of judicial expediency.

Although the United States Supreme Court has not specifically addressed the question of the validity of the doctrine subsequent to *Benton,* it has again indicated on this point that judicial expediency should not be obtained at the expense of justice in *United States v. Maze,* 414 U. S. 395, 38 L. Ed. 2d 603, 94 S. Ct. 645 (1974). The Supreme Court cited with approval the statement of the Sixth Circuit in the same case when it refused to apply the concurrent sentence doctrine, holding:

> "No considerations of judicial economy or efficiency have been urged to us that would outweigh the interest of appellant in the opportunity to clear his record of a conviction of a federal felony. 468 F. 2d 529, 536 n.6" 38 L. Ed. 2d at 607, n.1.

One of the leading Circuit Court decisions subsequent to *Benton* which continues to question the validity of the doctrine is *United States v. Tanner,* 471 F. 2d 128 (7th Cir. 1972) where the Court held:

> "Until recently, the validity of Count VII would have rendered unnecessary further inquiry into the validity of Count IV where Tanner is concerned, and Counts I and IV where Pearl is concerned. Appellate review would here be avoided since Tanner and Pearl's sentences under Count VII are concurrent with the sentences assessed under all other counts of the indictment. [Citations omitted] But the Supreme Court's decision in *Benton v. Maryland,* [citation omitted] constitutes a re-evaluation of the 'concurrent sentencing doctrine.' *Benton* holds that there is no jurisdictional bar (stemming from the requirement of justiciability) to a consideration of all counts



> under concurrent sentences. The Court points out that an unreviewed count could increase an appellant's future sentencing under a habitual offender statute, or adversely affect his chances for parole, or be used to impeach his testimony at a future trial. *Benton* suggests that review is desirable where adverse collateral consequences of this nature may flow from conviction. [citations omitted] Since we cannot say that there is no possibility of undesirable collateral consequences attendant upon these convictions, we choose to consider the validity of all the challenged counts." 471 F. 2d at 140.

A recent case in the same circuit citing the *Tanner* decision is *Crovedi v. United States,* 517 F. 2d 541 (7th Cir. 1975) holding:

> "At one time the two sentences to be served would have eliminated the necessity of vacating either by virtue of their being concurrent. In this Circuit, at least because of the possibility of undesirable collateral consequences attendant upon more than one conviction, the so called concurrent sentence doctrine would not be applicable." 517 F. 2d at 550.

Similarly citing the *Tanner* decision with approval in refusing to apply the doctrine is *Wright v. United States,* 519 F. 2d 13 (7th Cir. 1975).

Outside the 7th Circuit, the *Tanner* decision has also received approval in *United States v. Belt,* 516 F. 2d 873 (8th Cir. 1975) where the defendant was convicted of robbery, larceny and burglary and the Court refused to apply the doctrine stating:

> "We seriously question the efficacy of the concurrent sentence rule where the crimes charged in the various counts are serious and differing in substance. In such instance, the possibility of collateral effects from a possibly erroneous conviction appear very real." 516 F. 2d at 876.

There are additional questions concerning the application of the concurrent sentence doctrine which the courts have yet to consider. A collateral consequence of a conviction totally independent from the length of the prison sentence is the social stigma which attaches to a prisoner convicted

of a crime. The stigma is a very real consideration and to a certain degree will vary with the number of convictions. The refusal to grant a defendant the access of the court system to challenge an erroneous conviction because the length of his imprisonment will not be affected must of necessity be a denial of his Constitutional guarantee of due process. To label a defendant's wrongful conviction as irrelevant or outweighed by judicial expediency violates all concepts of justice.

The appellant therefore requests that the validity of the concurrent sentence doctrine be re-examined and appellant's conspiracy conviction be reviewed in accordance with the issues raised on appeal. Appellant alleges and asserts that failure to do so violates due process of law.

B. Even should this Court recognize the validity of the concurrent sentence doctrine, it was wrongfully applied in this case since the appellant's substantive count was "tainted" by a wrongful conviction on the conspiracy count. The failure of the trial Court to grant a severance or alternatively instruct the jury as to multiple conspiracies rather than a single conspiracy requires the reversal of the substantive count as well as the conspiracy count.

Appellant's brief on appeal points out that the same error requiring reversal of the conspiracy count taints the substantive count because of the trial Court's repeated instruction that acts or statements of any of the conspirators may be used against the co-conspirators. This rule is clearly established in the United States Supreme Court decision of *Kotteakos v. United States*, 328 U. S. 750, 90 L. Ed. 1557, 66 S. Ct. 1239 (1945) which has been cited extensively and never been reversed by subsequent Supreme Court decisions. In reversing the conspiracy count on the grounds that a single conspiracy was charged and instructed to the jury while multiple conspiracies were indicated by the evidence, the *Kotteakos* Court also required the substantive counts to be reversed stating:

> "Moreover, the effect of the Court's misconception extended also to the proof of overt acts. Carrying forward his premise that the jury could find one conspiracy on the



> evidence, the trial judge further charged that, if the jury found a conspiracy, 'then the acts or the statements of *any* of those whom you so find to be conspirators between the two dates that I have mentioned, may be considered by you in evidence as against *all* of the defendants whom you so find to be members of *the* conspiracy.' (Emphasis added)
>
> "On those instructions it was competent not only for the jury to find that all of the defendants were parties to a single common plan, design and scheme, where none was shown by the proof, but also for them to impute to each defendant the acts and statements of the others without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could only have affected some." 90 L. Ed. at 1567-1570.

The substance of this argument applied to this case is that the appellant could have been convicted from evidence applicable only to a co-defendant who was, according to the evidence, a member of a different conspiracy, but such evidence was transferred to the appellant by a combination of the single conspiracy instruction and the co-conspirator instruction. This rule adopted by *Kotteakos* is graphically demonstrated in a dissenting opinion in the case of *United States v. Johnson*, 515 F. 2d 730 (7th Cir. 1975) where the majority of the Court failed to consider *Kotteakos* as to the substantive counts after reversing the conspiracy counts. In pointing out the effect on the substantive counts, Judge Swygert stated:

> Since the jurors in the case at bar heard evidence involving a conspiracy in which Johnson had no part, an impermissible spillover resulted as to the substantive crimes charged against him. . . Two courses were open to the trial judge. He could have granted a severance at the close of the Government's evidence or he could have given a cautionary instruction. He did neither. As to severance the Government should have known at the close of its evidence what it readily concedes now: that it had proved two separate conspiracies instead of one. The trial judge should have known it also because it was

brought to his attention by the defendant's motion for severance.

"But short of granting severance the judge had a duty to admonish the jury during his charge that it should disregard the evidence of the larger conspiracy in deciding the guilt or innocence of the defendant as to the substantive charges. Instead he gave the standard instruction covering the co-conspirator exception to the hearsay rule. . ." 515 F. 2d at 738.

Similarly, Judge Swygert held that the standard instruction which states that each defendant is entitled to have his guilt or innocence determined from the evidence which applies to him as if he were tried alone was totally inadequate to meet the problem which the irrelevant evidence and co-conspirator instruction presented.

It is the appellant's position that even if the concurrent sentence doctrine maintains some validity, this Court erroneously applied it to this case since those issues raised by appellant and not decided by this Court affected both the conspiracy and substantive count. Therefore, the appellant requests that a rehearing be granted to decide these issues as to both counts.

C. Somewhat related to the spillover of evidence mentioned above is another body of law which may apply to either a conspiracy or substantive count and was overlooked by this Court on appeal. The appellant in his brief cited the "spillover effect" as it is described in *Moore's Federal Practice*, §1404[4] and a number of decisions following the rule announced in *United States v. Kelly*, 349 F. 2d 720 (2nd Cir. 1965), cert. denied 384 U. S. 947, 16 L. Ed 2d 544, 86 S. Ct. 1467. This rule is not dependent upon the giving of an instruction covering the co-conspirator exception to the hearsay rule but certainly such would intensify the magnitude of the spillover effect as mentioned above.

The spillover effect as mentioned in *Moore's Federal Practice*, §1404[4] states:

"Severance may be required to protect a defendant from a 'spillover' of evidence where there is a gross disparity in the quantum of evidence as between the two defendants. In determining this issue primary consideration is given to whether the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants in view of its volume and limited admissibility."



This spillover effect required reversal in a case which is factually parallel to the appellant's situation. In *United States v. Bless*, 422 F. 2d 210 (2nd Cir. 1970) the indictment contained five counts. The first charged the defendant Pego alone with a sale on February 14, 1967, of 14 grams of heroin. Counts 2 and 3 charged Pego and co-defendant Febre with heroin sales on February 20, 1967, and March 8, 1967. Count 4 charged Pego, Febre and Bless with a sale on April 6, 1967, of 236 grams of heroin. Count 5 charged all with conspiracy. At the outset of trial Pego pleaded guilty to all five counts. The trial then proceeded on Counts 2 through 5 against Febre and Counts 4 and 5 against Bless. Extensive evidence was offered in respect to the earlier sales by Pego and Febre. There was no proof of Bless' involvement in any of these negotiations or sales. His participation did not commence until April 5, 1967. The evidence of the prior sales was admitted into evidence against Bless over objection "subject to connection" with Bless. The appellate court reversed the decision stating:

"Absent an instruction to the jury that the extensive evidence of earlier narcotics sales was not to be considered in determining Bless' guilt or innocence of the charge that he made the April 6th sale, the jury may have concluded that Bless was somehow or other connected with the earlier sales and therefore guilty of the April 6th sale, even though there is no proof that he knew of or participated in the earlier dealings." 422 F. 2d at 213.

Appellant's situation presented an even greater danger of spillover than in the *Bless* case. There were more counts in the indictment, more defendants, more alleged overt acts with which the appellant was admittedly not connected and the bulk of evidence concerned defendants who were not even present at the trial. Other cases citing the spillover rule in *Kelly* are *United States v. Branker*, 395 F. 2d 881 (2nd Cir.

1968) and *United States v. Gambrill*, 449 F. 2d 1148 (U. S. App. D.C. 1971) which were cited in appellant's brief. The spillover effect resulting from a disparity in the amount of evidence among defendants is a very important consideration which this Court overlooked in the present case on appeal. Therefore, the appellant requests that this Court grant a rehearing to examine this issue as to both the substantive and conspiracy counts.

For the foregoing reasons, it is urged that this petition be granted.

Dated January 31, 1976.

Respectfully submitted,
/s/ *Jack Focht*
Jack Focht
Counsel for Appellant

I hereby certify that the foregoing petition is submitted in good faith and not for purposes of delay.

/s/ *Jack Focht*
Jack Focht
Counsel for Appellant

**CERTIFICATE OF MAILING**

The undersigned certifies that he sent a true and correct copy of the above and foregoing Petition for Rehearing to Mr. Stephen K. Lester, Assistant U. S. Attorney, U. S. Federal Building, 401 N. Market, Wichita, Kansas 67201, postage prepaid, this 31st day of January, 1976.

/s/*Jack Focht*
Jack Focht



**JANUARY TERM — FEBRUARY 25, 1976**

**Before The Honorable David T. Lewis, Chief Judge, The Honorable Oliver Seth and The Honorable Robert H. McWilliams, Circuit Judges**

| | |
|---|---|
| **UNITED STATES OF AMERICA,**<br>**Plaintiff-Appellee,**<br>**vs.**<br>**JOHN EXABA IRVING,**<br>**Defendant-Appellant.** | **No. 75-1169** |

**This matter comes on for consideration of the petition for rehearing filed by the appellant in the captioned cause.**

**Upon consideration whereof, it is ordered that the petition for rehearing is denied.**

***/s/ Howard K. Phillips***
**HOWARD K. PHILLIPS, Clerk**

**By /s/ *Mary A Sherman***
**Deputy Clerk**

No. 75-1373

# In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN EXABA IRVING, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*

RICHARD L. THORNBURGH,
*Assistant Attorney General,*

MICHAEL W. FARRELL,
ROGER A. WAY, JR.,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1975

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No. 75-1373

JOHN EXABA IRVING, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 18-23) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on January 19, 1976. A petition for rehearing was denied on February 25, 1976 (Pet. App. 37). The petition for a writ of certiorari was filed on March 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the concurrent sentence doctrine should be abandoned.

2. If not, whether the court of appeals properly invoked the doctrine in the circumstances of this case.

## STATEMENT

1. Following a jury trial in the United States District Court for the District of Kansas, petitioner was convicted of conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. 846, and of distribution of heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of five years' imprisonment, with immediate parole eligibility pursuant to 18 U.S.C. 4208(a)(2) (Pet. App. 24).[1] The court of appeals affirmed.

In the latter part of 1973, Park M. Kaestner, a Kansas City Police officer working in an undercover capacity, purchased heroin on three occasions from Larry Ray Thompson (Tr. 18, 21-25).[2] Thompson subsequently introduced Kaestner to Patricia Ponds, whom he identified as his source; on that occasion Thompson and Ponds sold Kaestner an ounce of heroin (Tr. 26-30). Approximately a week later, Kaestner purchased two capsules of heroin from Ponds (Tr. 59-61).

On January 28, 1974, Kaestner met Ponds in a motel room. Kaestner refused to purchase an ounce of heroin from Ponds unless he could meet her source. Ponds made a telephone call, explained the problem to the other party, and handed the receiver to Kaestner. Kaestner told the "gentleman" that he would not purchase any

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[1]The district court apparently neglected to impose the terms of special parole required by 21 U.S.C. 841(b).

[2]The indictment charged six persons with conspiracy and substantive counts of unlawful distribution. Patricia Ponds and Anthony Minnis, who were tried with petitioner, were convicted on all counts on which they were charged. Larry Ray Thompson pleaded guilty to one substantive count prior to trial and testified on behalf of Ponds. Peter Calvin Jones and Elizabeth Smallwood were fugitives at the time of trial.



more heroin from Ponds because of the inferior quality of the drugs she had previously supplied (Tr. 74).[3] The other person told Kaestner that he would "be by" after he had attended a boxing match. Subsequently petitioner, whom Ponds introduced to Kaestner as "X", arrived at the motel room and gave Kaestner his choice of the ounce of heroin that Ponds earlier had offered him or two ounces that petitioner had brought with him. Kaestner paid petitioner $1,200 for one of his ounces. Petitioner then picked up the remaining heroin and left the room (Tr. 73-78).

Over a month later, Kaestner again met Ponds in Witchita and was introduced to Peter Calvin Jones and Anthony Minnis. He negotiated with them the purchase of an ounce of heroin and received a small sample. Kaestner then met with Elizabeth Smallwood and purchased the ounce of heroin from her for $1,250 (Tr. 82-90).

The court of appeals, noting that petitioner had received concurrent sentences for his conspiracy and substantive convictions, considered and rejected petitioner's challenges to the validity of his conviction for unlawful distribution and declined to decide the merits of his conspiracy conviction. It wrote: "the court's affirmance of conviction of [the distribution] count precludes the necessity of review of the count of conspiracy, since reversal of that count would not alter the sentence imposed, nor cause any adverse consequences" (Pet. App. 23).

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[3]Kaestner testified over objection that his experience indicated that a purchase of a large amount of heroin tended to be of a higher quality than small purchases, which were usually diluted to a "street level." He testified that the substance purchased from Ponds was only one and one-half to two percent heroin, whereas the substance that he later purchased from petitioner was 14 percent heroin (Tr. 53-58, 222-224).

## ARGUMENT

Petitioner contends that there is a conflict among the circuits as to the validity of the concurrent sentence rule and that, at least in cases where infirmities in a conspiracy conviction might also invalidate an underlying substantive conviction, the rule is inconsistent with this Court's decision in *Kotteakos* v. *United States*, 328 U.S. 750. Neither of these contentions is substantial.

1. The concurrent sentence doctrine was first enunciated by Chief Justice Marshall in *Locke* v. *United States*, 7 Cranch 339, 344. It has been an accepted part of our jurisprudence ever since. See, *e.g.*, *Snyder* v. *United States*, 112 U.S. 216, 217; *Claassen* v. *United States*, 142 U.S. 140; *Hirabayashi* v. *United States*, 320 U.S. 81, 105. It rests upon the understanding that a concurrent sentence creates few, if any, collateral consequences in addition to those properly attributable to the sentence that has been considered and upheld by the appellate court.[4]

In *Benton* v. *Maryland*, 395 U.S. 784, 788-791, this Court held that there is no jurisdictional bar (stemming from the constitutional requirement of justiciability) to review by an appellate court of all convictions for which concurrent sentences have been imposed. The Court recognized, however, that "as a rule of judicial convenience" a reviewing court may in its discretion decline to

[4]For example, the United States Parole Commission treats multiple convictions with concurrent sentences as a single offense. See 41 Fed. Reg. 19333, amending 28 C.F.R. 2.20. In computing offense severity for use as part of its release guideline program, the Commission considers the most serious offense for which a sentence has been imposed and ignores less serious or equally serious offenses for which the offender is serving concurrent sentences. Thus where, as here, an offender's crimes are equally serious, the concurrent but unreviewed conviction has no effect on parole consideration.



consider issues relevant to other counts after affirming a conviction for which a concurrent sentence was imposed. In *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16, the Court again recognized the validity of the concurrent sentence rule as one of judicial convenience, declining "as a discretionary matter" to reach issues pertaining to other counts that carried concurrent sentences after affirming convictions on two counts.[5]

In the wake of *Benton*, the Seventh Circuit has adopted a rule of practice that unless "there [is] no possibility of undesirable collateral consequences," it will consider the validity of convictions on all challenged counts, even those carrying concurrent sentences. *United States* v. *Tanner*, 471 F.2d 128 (C.A. 7), certiorari denied, 409 U.S. 949; *Crovedi* v. *United States*, 517 F.2d 541 (C.A. 7). But, in keeping with *Benton*, the same court has emphasized that this practice was adopted purely "in the exercise of its discretion" and that, in any given case, it "need not have reached these issues." *United States* v. *McLeod*, 493 F.2d 1186, 1189 and n. 1. Thus the Seventh Circuit is simply utilizing its discretion under the rule in a particular manner; it has not denied that it possesses discretion.

Other circuits have used the discretion to resolve some claims and pretermit others. The Eighth Circuit, for example, has "question[ed] the efficacy of the * * * rule" in some circumstances (*United States* v. *Belt*, 516 F.2d 873, 876 (C.A. 8), certiorari denied, No. 75-5362, January 12, 1976), but has employed it in other cases. See *United States* v. *Wilson*, 497 F.2d 602,

[5]On the other hand, in *United States* v. *Maze*, 414 U.S. 395, 397 n. 1 the Court found "appropriate" the decision of the lower court to consider "the mail fraud convictions [presented by this case]" even after affirming the defendant's Dyer Act conviction carrying an identical concurrent sentence.

605 n. 4 (C.A. 8), certiorari denied, 419 U.S. 1069; *United States* v. *Simone*, 495 F.2d 752, 753-754 (C.A. 8).[6]

Moreover, even if petitioner is correct that, in determining whether to apply the concurrent sentence rule in a given case, some circuits appear to give greater weight than do others to the possible adverse collateral effects of convictions, that is no reason for this Court to establish an inflexible rule. There is no disagreement among the circuits on the principle that application of the concurrent sentence rule is appropriately entrusted to the discretion of the particular reviewing court; such differences in emphasis as may exist among the circuits in deciding when to employ the doctrine are the inevitable consequence of the broad discretion with which the courts are endowed in this regard.

2. Petitioner urges, however, that the court of appeals erred in refusing to consider the validity of his conspiracy conviction in this case because the "spillover" of evidence relating to conspiracies of which he was not a part affected the substantive conviction (Pet. 14-17). See *Kotteakos* v. *United States*, 328 U.S. 750. But the substantive count on which petitioner was convicted involved a sale of heroin in which petitioner was a direct participant. There is, therefore, no basis for assuming that the jury relied on evidence of his participation in the conspiracy to convict him on the substantive count.

The sale of heroin underlying petitioner's substantive conviction was a discrete event, separated chronologically from the other sales testified to by Kaestner. It presented the jury with a relatively simple issue: whether to believe

[6]Compare *United States* v. *Maze*, 468 F.2d 529 (C.A. 6), affirmed, 414 U.S. 395 (resolving claim), with *Ethridge* v. *United States*, 494 F.2d 351 (C.A. 6), certiorari denied, 419 U.S. 1025 (invoking concurrent sentence rule).



Kaestner or petitioner and his associate Ponds (both of whom testified) concerning the events that occurred on January 28. Even assuming, therefore, that the evidence showed the existence of multiple conspiracies rather than the single one alleged, there is no significant danger that evidence of the guilt of other defendants who were not present on January 28 was used by the jury to convict petitioner of the sale on that occasion. See *United States* v. *Miley*, 513 F.2d 1191, 1208-1209 (C.A. 2); *United States* v. *Johnson*, 515 F.2d 730, 733 n. 8, 736 (C.A. 7).[7]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]In the court of appeals, petitioner argued that he was prejudiced as to both the conspiracy and substantive counts by Kaestner's testimony comparing the purity of the heroin he had received from Ponds and petitioner, because this testimony arguably implied that petitioner was a dealer in large quantities of heroin (see note 3, *supra*; Pet. App. 20). But whether or not this testimony was relevant to the conspiracy count, it was independently admissible under the substantive count to explain Kaestner's testimony that he refused to buy heroin from Ponds until he was assured by her source that he would receive better quality drugs.